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## International Trade Law Aspects of Measures to combat IUU and Unsustainable Fishing

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## CHAPTER FOURTEEN

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# INTERNATIONAL TRADE LAW ASPECTS OF MEASURES TO COMBAT IUU AND UNSUSTAINABLE FISHING

Robin Churchill

### 1. INTRODUCTION

Over the past 20 years or so trade measures have been increasingly used to combat illegal, unreported and unregulated (IUU) fishing, as well as unsustainable fishing.<sup>1</sup> Such measures, defined in the following section, are called for by the International Plan of Action on IUU Fishing (IPOA-IUU), adopted by the FAO in 2001,<sup>2</sup> although, according to the Plan, they are only to be used in “exceptional circumstances”, where other measures have proved unsuccessful.<sup>3</sup> In practice, however, trade measures have not been used as sparingly as the IPOA-IUU might suggest. They have become recognised as a valuable tool in the fight against IUU and unsustainable fishing because they act as an economic disincentive to engage in such fishing by making it more difficult to find a market for the catch.<sup>4</sup> A recent study suggests that trade measures, at least where applied multilaterally, have been effective in combating IUU fishing and recommends that they should be continued and strengthened,<sup>5</sup> a recommendation also made by others.<sup>6</sup> Nevertheless, the utility of trade measures is limited by the fact that they can, of course, only be used in relation to that part of the marine fish catch that is internationally traded. This is estimated to be around 37 per cent of the total world catch.<sup>7</sup>

The previous Chapter looked at measures to combat IUU fishing from the perspective of international fisheries law. This Chapter examines such measures through the prism of

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<sup>1</sup> The concepts of IUU fishing and unsustainable fishing, and the distinction between them, are discussed in section 2 below.

<sup>2</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the FAO in 2001, paras. 65-76, available at <[www.fao.org/docrep/003/y1224e/y1224e00.htm](http://www.fao.org/docrep/003/y1224e/y1224e00.htm)>.

<sup>3</sup> Ibid., para. 66.

<sup>4</sup> See further M. Lack *Catching On? Trade-related Measures as a Fisheries Management Tool* (TRAFFIC International, Cambridge: 2007); M.W. Lodge et al., *Recommended Best Practices for Regional Fisheries Management Organizations* (Chatham House, London: 2007); OECD *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OCED, Paris: 2004); and C.A. Roheim and J. Sutinen *Trade and Marketplace Measures to Promote Sustainable Fishing Practices* (International Centre for Trade and Sustainable Development (ICTSD), Geneva: 2006).

<sup>5</sup> G. Hosch *Trade Measures to Combat IUU Fishing* (ICTSD, Geneva: 2016), especially 58-60.

<sup>6</sup> See, for example, U.R Sumaila *Trade Policy Options for Sustainable Oceans and Fisheries* (ICTSD, Geneva: 2016); Northwest Atlantic Fisheries Organization *NAFO Performance Assessment Review 2011*, 32-3 and 126, <<https://www.nafo.int/Portals/0/PDFs/gc/PAR-2011.pdf?ver=2016-02-24-141015-577>>; (US) *Presidential Task Force on Combating IUU Fishing and Seafood Fraud Action Plan for Implementing the Task Force Recommendations* (2015) <[https://www.iuufishing.noaa.gov/Portals/33/noaa\\_taskforce\\_report\\_final.pdf](https://www.iuufishing.noaa.gov/Portals/33/noaa_taskforce_report_final.pdf)>; and UN General Assembly Resolutions on sustainable fishing, e.g. A/Res/71/123 of 7 December 2016, paras. 87, 103 and 104.

<sup>7</sup> Hosch, note 5, at 3. Whether the proportion of IUU and unsustainably caught fish that is traded is at the same level is probably impossible to discover. It is estimated that about 18 per cent of the total world marine fish catch is the product of illegal fishing: see D.J. Agnew et al., “Estimating the Worldwide Extent of Illegal Fishing” (2009) 4(2) *PLoS ONE* available at <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0004570>>.

international trade law. It begins by addressing some necessary, if perhaps rather obvious, questions of definition (section 2), before outlining the various types of trade measure that have been used to combat both IUU and unsustainable fishing (section 3). A constant refrain of the IPOA-IUU is that such measures should be compatible with international trade law.<sup>8</sup> The last, and major, part of the Chapter is therefore concerned with this question. Section 4 outlines the relevant trade law, while section 5 assesses how far the various types of trade measure outlined in section 3 are compatible with the law discussed in section 4. The focus of this Chapter is thus on the compatibility of trade measures used to combat IUU and unsustainable fishing with international trade law. The question of the effectiveness of such measures lies beyond the scope of this Chapter.<sup>9</sup> The Chapter ends with some brief conclusions (section 6).

## 2. SOME DEFINITIONAL ISSUES

So far reference has been made to “trade measures” without attempting to define this term. For the purposes of this Chapter a trade measure is any measure that prohibits, restricts or imposes conditions on the import or export of fish<sup>10</sup> with the aim of combating IUU or unsustainable fishing, regardless of how a measure is characterised by its author. This last point is important because some measures that are in reality trade measures are characterised by their authors in other terms, notably as port State measures.<sup>11</sup> One trade measure of potential relevance is action against subsidies for fishing operations, a major problem in world fisheries because such subsidies often lead to over-capacity.<sup>12</sup> This type of trade measure will not be discussed in this Chapter for the reasons that such subsidies are not directly a cause of IUU fishing; there is uncertainty as to how far the Agreement on Subsidies and Countervailing Measures of the World Trade Organization (WTO) applies to such subsidies;<sup>13</sup> and no action has ever been taken against WTO members employing such subsidies, either by applying countervailing measures under the Agreement or by challenging such subsidies as a breach of the Agreement in proceedings under the WTO’s Dispute Settlement Understanding (DSU).<sup>14</sup> Since 2001, members of the WTO have been engaged in negotiations on a regime to control fisheries subsidies as part of the Doha Development Agenda, but no agreement has yet been forthcoming.<sup>15</sup>

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<sup>8</sup> IPOA-IUU, note 2 at paras. 65-68.

<sup>9</sup> On this question, see Hosch, note 5; and M.A. Young *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing* (ICTSD, Geneva: 2015).

<sup>10</sup> “Fish” in this Chapter refers both to unprocessed fish (e.g. fresh, chilled and frozen fish) and to processed fishery products.

<sup>11</sup> Cf. the IPOA-IUU, which distinguishes between port State measures (paras 52-64), some (but not all) of which are clearly trade measures (e.g. paras. 56 and 63), and “internationally agreed market-related measures” (paras 65-76). Virtually all of the latter are trade measures. A number of writers make a distinction between “port States” and “market States”, the latter meaning States that deny access to their markets: see, for example, C. Elvestad and I. Kvalvik “Implementing the EU-IUU Regulation: Enhancing Flag State Performance through Regulatory Measures” (2015) 46 *Ocean Development and International Law* 241, 241-2 and 243. However, as will become evident, these categories are not mutually exclusive. A State that prohibits a foreign fishing vessel from landing its catch in that State’s ports for the purpose of sale is both a port State and a market State.

<sup>12</sup> See further U.R. Sumaila et al. “A bottom-up re-estimation of global fisheries subsidies” (2010) 12 *Journal of Bioeconomics* 201-25; and World Bank *The Sunken Billions Revisited: Progress and Challenges in Global Marine Fisheries* (World Bank, Washington DC: 2017).

<sup>13</sup> Agreement on Subsidies and Countervailing Measures, 1994 1869 UNTS 14.

<sup>14</sup> Agreement establishing the World Trade Organization, Annex 2 Understanding on Rules and Procedures governing the Settlement of Disputes, 1994 1867 UNTS 3.

<sup>15</sup> Further on the application of international trade law to fisheries subsidies, see C-J. Chen *Fisheries Subsidies under International Law* (Springer, Berlin: 2010); M.A. Young *Trading Fish, Saving Fish* (Cambridge University Press, Cambridge: 2011) 85-133; and R. Barnes and C. Massarella “High Seas Fisheries” in E. Morgera and K.

This Chapter is concerned with trade measures that target IUU and unsustainable fishing, and it is therefore necessary to say something about the meaning of each of these two terms. As regards IUU fishing, there is a tendency to use the term as though it referred to a monolithic concept, when in fact it refers to a variety of undesirable fishing activities.<sup>16</sup> Certainly, for the purposes of this Chapter, the various elements that make up IUU fishing, as set out in the widely accepted definition of that term in Article 3 of the IPOA-IUU, need to be disaggregated.<sup>17</sup> “Illegal” fishing refers either to fishing within the limits of national jurisdiction contrary to the laws of the relevant coastal State or to fishing within the regulatory area of a regional fisheries management organization (RFMO) by vessels registered in a member of that RFMO contrary to the latter’s binding conservation and management measures. Trade measures have frequently been used against the latter type of illegal fishing, but only incidentally against the former type. For that reason the term “illegal fishing” in this Chapter will refer only to the latter type of unlawful fishing unless otherwise clearly indicated. The second element of IUU fishing, unreported fishing, refers to fishing activities that have not been reported or have been misreported to the relevant coastal State or RFMO, contrary to a legal obligation to do so. It is therefore a form of illegal fishing. Thus, for the sake of simplicity, unreported fishing will not be distinguished in this Chapter from other kinds of unlawful fishing but will be included in the term “illegal fishing” as used above. The third element of IUU fishing, unregulated fishing, is defined in the IPOA-IUU as fishing in the regulatory area of a RFMO by Stateless vessels or by vessels registered in a non-member of that RFMO contrary to the latter’s conservation and management measures, as well as fishing activities (whether within or beyond the limits of national jurisdiction) where there are no applicable conservation and management measures and where such activities “are conducted in a manner inconsistent with State responsibilities for the conservation of living resources under international law.”<sup>18</sup> Trade measures have rarely, if ever, been used against the latter type of unregulated fishing, and so the term “unregulated fishing” is used in this Chapter to refer only to the former type of unregulated fishing unless otherwise clearly indicated.

Unlike the term “IUU fishing”, the term “unsustainable fishing” has not been officially defined. In a narrow sense it refers to fishing for one or more fish stocks at a level that is not sustainable over a period of time, in other words at a level that will cause the size of the stock(s) concerned to decline. Unsustainable fishing in this sense is not synonymous with IUU fishing. It is true that illegal and/or unregulated fishing will often be at or lead to a level of fishing that is unsustainable, but it need not necessarily do so. Conversely, it is possible for lawful fishing to be unsustainable, for example if total allowable catches or total effort limits are set at excessive levels by the relevant management body. Apart from the definition just given, unsustainable fishing can also be given a broader meaning, where fishing activities are conducted in a way that is unsustainable for the marine environment as a whole. This includes activities that result in non-target species (not only fish but also fauna such as marine mammals or marine amphibians) being caught at levels where the long-term well-being of those species is threatened,<sup>19</sup> and fishing activities that damage habitats such as seamounts and coral reefs through trawling and dynamite fishing, respectively.<sup>20</sup> Unsustainable fishing in this broad sense may occur in both legal and illegal fishing. This Chapter will deal with unsustainable fishing

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Kulovesi (eds.) *Research Handbook on International Law and Natural Resources* (Edward Elgar, Cheltenham: 2016) 369-89 at 381-3.

<sup>16</sup> See further A. Serdy *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, Cambridge: 2016) 141-76.

<sup>17</sup> See also Chapter 13 in this Volume (Van der Marel).

<sup>18</sup> IPOA-IUU, note 2 at para. 3.3.2.

<sup>19</sup> See further Chapter 7 in this Volume (Scott).

<sup>20</sup> See further Chapter 9 in this Volume (Dunn/Ortuño Crespo).

in both the narrow and broad senses just described, although trade measures against unsustainable fishing in the narrow sense have been used relatively infrequently.

Trade measures against illegal, unregulated or unsustainable fishing can only be used, of course, where fish is internationally traded.<sup>21</sup> That raises the question of when fish is traded. The answer to this question is not as straightforward as might be initially supposed. In broad terms, trade in goods occurs where goods originating in one State are transported to another State and sold there. But where do goods originate when they are taken from the sea? The answer to this question depends on rules of origin. Rules relating to the origin of marine fish have not (yet) been harmonised by the WTO,<sup>22</sup> so national rules of origin or the rules of origin contained in preferential trade agreements apply to determine whence fish originate.<sup>23</sup> Since it is clearly impossible to examine all or even a majority of such rules, a brief review of the rules of origin of the European Union (EU) will be given as an exemplar, as the EU is by far the world's largest importer and trader of fish.<sup>24</sup> EU law provides that where fish are caught in the territorial sea or internal waters of a particular State, they originate in that State. Where fish are caught beyond such waters, i.e. in the exclusive economic zone (EEZ) and on the high seas, the flag State of the vessel catching the fish is the State of origin.<sup>25</sup> Fish obtained or produced from factory ships is considered to originate from the flag State of the factory ship where the ship is supplied by a vessel having the same nationality and caught in the EEZ or on the high seas.<sup>26</sup> EU law does not specify what the position is where a factory ship and its supplying vessel have different nationalities or where fish is transhipped to a vessel other than a factory ship. In both cases it would seem likely that the State of origin will be the flag State of the vessel that caught the fish. Where fish has been processed, the State of origin will be the State on whose territory or on one of whose vessels the fish underwent its last, substantial, economically-justified processing or working resulting in the manufacture of a new product or representing an important stage of manufacture.<sup>27</sup> One consequence of the EU's rules of origin is that where a fishing vessel registered in State A lands a catch of fish at a port in State B, and the catch has been taken from outside B's territorial sea, this will constitute trade, with A being the exporting State and B the importing State. This is particularly significant where port States regulate the landing of catches from foreign vessels.

### **3. A SURVEY OF TRADE MEASURES USED TO COMBAT ILLEGAL, UNREGULATED AND UNSUSTAINABLE FISHING**

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<sup>21</sup> For simplicity's sake the terms "trade" and "traded" will be used henceforth in this Chapter rather than "international trade" and "internationally traded".

<sup>22</sup> See further A. Serdy "Law of the Sea Aspects of the Negotiations in the World Trade Organization to Harmonise Rules of Origin" (2007) 22 *International Journal of Marine and Coastal Law* 235-56.

<sup>23</sup> The concept of preferential trade agreements is explained below: see text at note 75. On the origin of fish, see also the discussion below concerning the term "introduced from the sea": see text at note 60. In general terms, fish become potentially subject to international trade law from the time that they are caught: see K. Kulovesi "International Trade: Natural Resources and the World Trade Organization" in Morgera and Kulovesi, note 15, 46-65 at 48-53.

<sup>24</sup> FAO, *The State of World Fisheries and Aquaculture 2016*, 53-4, available at <<http://www.fao.org/3/a-i5555e.pdf>>.

<sup>25</sup> Commission Delegated Regulation (EU) No 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, *Official Journal of the European Union* (OJ) 2015 L343/1, Arts. 31(e) and (f), 44(f) and (h) and 60(f) and (g). In the case of the preferential rules of origin, there are also certain conditions to be fulfilled that are aimed at ensuring that there is a close link between a fishing vessel and its flag State.

<sup>26</sup> *Ibid.*, Arts. 31(g), 44(i) and 60(h).

<sup>27</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ 2013 L269/1, Art. 60(2); and Reg. 2015/2446, note 22, Arts. 41(b) and 59(1)(b).

### **3.1 Introduction**

This section surveys the different types of trade measures that have been used against illegal, unregulated and unsustainable fishing. Such measures have been adopted multilaterally by international organizations (notably RFMOs), the Meetings of Parties to various treaties, and directly in the provisions of certain treaties. Measures have also been adopted unilaterally (in other words, a national measure adopted not in implementation of a multilateral measure) by a variety of States (notably the USA) and the EU, even though the IPOA-IUU states that unilateral trade measures “should be avoided.”<sup>28</sup> Some measures have been directed at States, others at individual fishing vessels.<sup>29</sup> These distinctions are important because, as will be seen, they bear upon the question of whether trade measures to combat illegal, unregulated and unsustainable fishing are compatible with international trade law.

As well as measures adopted at the multilateral level or by individual States, there are also measures adopted by non-governmental organizations (NGOs) relating to sustainable fishing that are capable of affecting trade. Of those, the best known is probably the certification scheme operated by the Marine Stewardship Council (MSC), which encourages sellers of fish products to attach appropriate labelling to products that have been derived from stocks that the MSC has certified as being sustainably fished.<sup>30</sup> The scheme is designed to influence consumer choice and may therefore indirectly affect the volume of trade. NGO measures will not be discussed in this Chapter because international trade law does not apply to non-State actors.

In roughly descending order of severity (as well as frequency of use), the following types of trade measure to combat illegal, unregulated or unsustainable fishing have been used: bans on imports; restrictions on transshipments; landing requirements; catch documentation and similar schemes; and labelling requirements. Each will now be examined in turn.

### **3.2 Bans on Imports**

Bans on the import of fish that is the product of IUU or unsustainable fishing have been used quite widely, both at the multilateral level and unilaterally. As pointed out in section 2 above, where a fishing vessel lands its catch in the port of a State other than the State of its own nationality, that landing constitutes an import. Thus, a ban on landing amounts to a ban on imports,<sup>31</sup> as well as to a ban on the transit of the fish onwards to a third State if such transit had been intended. Bans on imports can also be applied to more conventional forms of trading, such as where fish is transported by road, rail or air.

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<sup>28</sup> Para. 66.

<sup>29</sup> On the application of international fisheries measures to private actors, see Chapter 16 in this Volume (Massarella).

<sup>30</sup> On the MSC and its certification scheme, see its website < [www.msc.org/](http://www.msc.org/)>.

<sup>31</sup> See note 11 above on the relationship between port State measures and trade measures.

At the multilateral level many RFMOs use import bans as a means of combating illegal or unregulated fishing in their regulatory areas.<sup>32</sup> Import bans for the same purpose are also to be imposed under the FAO's Agreement on Port State Measures.<sup>33</sup>

Import bans have also been imposed unilaterally (i.e. not in the implementation of the above multilateral measures) by a number of States (notably the US<sup>34</sup>) and the EU. Perhaps the best known example is the EU's IUU Regulation.<sup>35</sup> The Regulation, *inter alia*, prohibits the landing of catches in the ports of EU Member States by foreign fishing vessels unless the catch is accompanied by a catch certificate and the vessels has provided specified information in advance. Landings by vessels on the EU's IUU vessel list or otherwise suspected of having engaged in IUU fishing are automatically prohibited.<sup>36</sup> There is also a prohibition on importing by means other than direct landings products obtained from IUU fishing and from non-cooperating States. Since the entry into force of the Agreement on Port State Measures in 2016, the prohibition on landings in the IUU Regulation should no longer be regarded as a unilateral measure, but rather as a means of implementing the Agreement. There is also a less well-known EU measure aimed at combating unsustainable fishing. Regulation 1026/2012 authorises the imposition of quantitative restrictions on imports from third States that allow unsustainable fishing for stocks of common interest to the EU and that third State.<sup>37</sup> The Regulation was used for the first, and so far only, time against the Faroe Islands in 2013, giving rise to litigation in the WTO, discussed in section 5.1 below.

### 3.3 Restrictions on transshipments

It is not uncommon for fishing vessels to tranship their catches at sea. Quite often this is done to try to avoid detection for having engaged in IUU or unsustainable fishing.<sup>38</sup> Where a fish and the vessel to which the catch is transhipped both have the same nationality, no trade occurs.

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<sup>32</sup> For further details, see D. S. Calley *Market Denial and International Fisheries Regulation* (Martinus Nijhoff, Leiden: 2012) 103-159; Hosch, note 5 at 9-18; Lodge et al., note 4 at 54-65; R. Rayfuse "Regional Fisheries Management Organizations" in D.R. Rothwell, A.G. Oude Elferink, K.N. Scott and T. Stephens (eds.) *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford: 2015) 439-62 at 453-7; and J. Swan *Implementation of Port State Measures: Legislative Template, Framework for Procedures, Role of Regional Fisheries Management Organizations* (FAO, Rome: 2016) at 143-72, available at <<http://www.fao.org/3/a-i5801e.pdf>>.

<sup>33</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2009, <[www.fao.org/documents/card/en/c/915655b8-e31c-479c-bf07-30cba21ea4b0](http://www.fao.org/documents/card/en/c/915655b8-e31c-479c-bf07-30cba21ea4b0)>, Arts. 9(4)-(6), 11(1) and 18(1). For comment on the Agreement, especially in relation to its provisions relevant to international trade law, see A. Serdy "The Shaky Foundations of the Port State Measures Agreement: How Watertight is the Legal Seal against Access for Foreign Fishing Vessels?" (2016) 31 *International Journal of Marine and Coastal Law* 421, 432-41.

<sup>34</sup> The US has a raft of legislation that authorises the prohibition of imports of the products of IUU and unsustainable fishing. See National Oceanic and Atmospheric Administration, US Department of Commerce, *Improving International Fisheries Management. January 2017 Report to Congress* <[http://www.nmfs.noaa.gov/ia/slider\\_stories/2017/01/2017biennialreport.pdf](http://www.nmfs.noaa.gov/ia/slider_stories/2017/01/2017biennialreport.pdf)>. Annex II lists the legislation, while the main body of the report gives examples of its application.

<sup>35</sup> Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and EC No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, OJ 2008 L266/1. The Regulation is discussed in detail in the previous Chapter; see also Hosch, note 5 at 27-38; and Elvested and Kvalvik, note 11.

<sup>36</sup> *Ibid.*, Arts. 4(2), 6-8, 11(2) and 37(5).

<sup>37</sup> Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, OJ 2012 L316/34.

<sup>38</sup> See further Lodge et al., note 4 at 52.

Where, however, the two vessels have different nationalities, and transshipment takes place outside the territorial sea of any State, there is a trading relationship, with the fishing vessel being the exporter and the vessel to which the catch is transhipped being the importer. Where such transshipment is made subject to conditions or is prohibited, it amounts to a restriction or ban on exports for the fishing vessel, and a restriction or ban on imports for the vessel to which the catch is transhipped. Where transshipment takes place in the territorial sea or internal waters (including ports) of a State other than the State of the nationality of the fishing vessel, there is also a trading relationship, with the coastal/port State being the importer. Any restriction on such transshipment will again amount to a restriction or ban on exports for the transshipping vessel and a restriction or ban on imports for the port State.

Transshipment in order to discourage IUU fishing has been regulated both at the multilateral level, by RFMOs<sup>39</sup> and the Port State Measures Agreement,<sup>40</sup> and unilaterally by individual States and the EU.<sup>41</sup>

### **3.4 *Landing Requirements***

It is not uncommon for a coastal State to require foreign vessels permitted to fish in its EEZ to land all or part of their catches in its ports. Such a requirement is expressly included in the type of measures that the UN Convention on the Law of the Sea (LOS Convention) permits a coastal State to adopt in respect of foreign vessels fishing in its EEZ.<sup>42</sup> The reasons for laying down a landing requirement vary. In some cases the reason may be to provide raw material for fish processing plants in the coastal State or to provide food for direct consumption by the coastal State's population. In other cases the purpose of a landing requirement is to ensure that a foreign vessel is observing the coastal State's legislation and the conditions of its licence to fish.

It follows from what was said in section 2 about the origin of fish that where a foreign vessel fishing in the EEZ lands its catch in the coastal State, it is exporting to that State, and conversely the coastal State is importing the catch. Thus, a landing requirement is a trade measure in the sense used in this Chapter, albeit of a very unusual kind, since it requires a foreign vessel to export its catch to the coastal State and prohibits that vessel from re-exporting its catch to other States. Where a landing requirement is for the purpose of combating illegal fishing, it will be a trade measure of the kind relevant to this Chapter.

### **3.5 *Catch Documentation and Similar Schemes***

The FAO defines a catch documentation scheme (CDS) as “a system with the primary purpose of helping determine throughout the supply chain whether fish originate from catches taken consistent with applicable national, regional and international conservation and management measures, established in accordance with relevant international obligations.”<sup>43</sup> “The supply chain” referred to is defined as “a sequence of processes involved in the production and distribution of fish from catch to the point of import in the end market, including events such

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<sup>39</sup> For details, see *ibid.*, at 53; Rayfuse, note 32 at 454-5.

<sup>40</sup> Agreement, note 33, Arts. 9(6), 11(1) and 18(1).

<sup>41</sup> See, for example, EU Reg. No 1005/2008, note 35, Art. 4(3) and (4) and 5.

<sup>42</sup> United Nations Convention on the Law of the Sea, 1982 1833 UNTS 3; Art. 62(4)(h).

<sup>43</sup> FAO, Voluntary Guidelines for Catch Documentation Schemes (2017), para. 2.1, available at <<http://www.fao.org/fi/static-media/MeetingDocuments/CDS/TC2016/wpAnnex.pdf>>. The Guidelines are discussed below, at notes 59 and following.



as landing, transshipment, re-export, processing, and transport.”<sup>44</sup> Thus, a CDS requires fish throughout the supply chain (as just defined) to be accompanied by documentation showing whether it was caught lawfully or whether it is the product of IUU fishing. Where the documentation reveals the latter to be the case, or a consignment of fish lacks the relevant documentation, import should be refused. The aim of CDSs, therefore, is to deny market access to illegally caught fish at all levels of the supply chain.<sup>45</sup> In trade law terms, CDSs amount to a condition of import; and where import is refused, a ban on imports.

CDSs and similar schemes have been adopted both at the multilateral level and unilaterally. At the multilateral level CDSs have been adopted by some RFMOs and directly by treaty. As far as action by RFMOs is concerned, at the present time only three RFMOs (the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and ICCAT) operate fully-fledged CDSs, while three other RFMOs are in the process of developing CDSs.<sup>46</sup> Some RFMOs have a more limited form of CDS, known as a catch certificate, which requires catches taken in the regulatory area of the RFMO concerned to be certified by the flag State as being within the set quota, properly reported, derived from authorized fishing operations and originating in an area confirmed through vessel monitoring systems data. A catch without such a certificate may not be landed or transhipped in the port of a member of the RFMO concerned.<sup>47</sup> Unlike a CDS proper, a catch certificate does not accompany a catch for onward trade after landing.

A rather different form of trade documentation is provided for in the Convention on Trade in Endangered Species (CITES).<sup>48</sup> The Convention seeks to protect endangered species “against over-exploitation through international trade” by tightly controlling trade in such species.<sup>49</sup> It provides that trade in species threatened with extinction, listed in Appendix I, may only be authorized in exceptional circumstances, such authorization being evidenced by the grant of both an export permit and an import permit by the States concerned.<sup>50</sup> Where a listed species is “introduced from the sea”, i.e. taken in the marine environment beyond the limits of national jurisdiction,<sup>51</sup> a certificate is required from the State of introduction. The latter is the flag State of the vessel that took the species concerned and is equivalent to the State of export.<sup>52</sup> Trade in species that are not immediately threatened with extinction but may become so unless trade is strictly regulated, which are listed in Appendix II, may only be authorized where trade will not be detrimental to the survival of the species concerned, such authorization being evidenced by the grant of an export permit or a certificate from the State of introduction, as the case may be.<sup>53</sup> In the case of both Appendix I and II species, where authorization is not forthcoming, trade is not permitted. Thus, in practice CITES either imposes a complete ban on trade or requires traded species to be accompanied by the documentation referred to. Fish of commercial interest were not originally included in the CITES Appendices. However, since 2002 the CITES Conference of the Parties (COP), which has the power to add and remove species from the Appendices, has added a number of fish species of commercial interest to the

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<sup>44</sup> Ibid., para. 2.9.

<sup>45</sup> Hosch, note 5, at 7 and 10. See also 11-13 and 18-22, and Lodge, note 4 at 58-60 for detailed discussion of how CDS operate.

<sup>46</sup> Hosch, *ibid.*, at 10-11. For a detailed study of CCAMLR’s CDS, see Calley, note 32, at 150-9.

<sup>47</sup> Elvestad and Kvalvik, note 11 at 243.

<sup>48</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 993 UNTS 243.

<sup>49</sup> CITES, fourth preambular paragraph.

<sup>50</sup> Arts. II(1) and III.

<sup>51</sup> See Art. 1(e), as read with a resolution of the CITES Conference of the Parties, Resolution Conf. 14.6 (Rev. CoP16) (2013), “Introduction from the Sea”, available at <<https://cites.org/eng/res/14/14-06R16.php>>.

<sup>52</sup> Resolution Conf. 14.6 (Rev. CoP16).

<sup>53</sup> Arts. II(2) and IV of CITES.

Appendices, including several species of shark.<sup>54</sup> The addition of marine fish to the CITES Appendices has proved extremely controversial, and attempts to add some species, such as toothfish and bluefin tuna, have been unsuccessful.<sup>55</sup> It is evident from the provisions of CITES that the object of listing marine fish is primarily to prevent unsustainable fishing. However, a resolution of the CITES COP recommends that prior to issuing permits or certificates for listed species introduced from the sea, the States of introduction and of import shall take into account whether the species concerned is the product of IUU fishing.<sup>56</sup>

CDSs and similar schemes have also been applied unilaterally. The best known example is probably that set out in the EU's IUU Regulation, which establishes a catch certification scheme to be used where there is no applicable RFMO CDS. The scheme requires imports of fishery products into the EU from non-EU Member States to be accompanied by a catch certificate issued by the flag State of the vessel that caught the fish, certifying that the exported fish came from a catch made "in accordance with applicable laws, regulations and international conservation and management measures", or broadly speaking, was not the product of IUU fishing.<sup>57</sup> If the fish was processed in a State other than the flag State, there must also be a processing statement issued by that other State. Imports of fish without the required documentation are prohibited.<sup>58</sup>

In 2017 the FAO Conference adopted Voluntary Guidelines for Catch Documentation Schemes.<sup>59</sup> The aim of the Guidelines is to provide assistance to States, RFMOs and others when developing and implementing new CDSs, which are seen as "a valuable supplement" to port State and other measures.<sup>60</sup> The Guidelines emphasise that a CDS should be in conformity with relevant provisions of international law, including WTO agreements, and should "not create unnecessary barriers to trade," i.e. "be the least-trade restrictive measure to achieve its objective."<sup>61</sup> As will be seen in section 4 below, this echoes wording in relevant WTO law.

### 3.5 Labelling Requirements

A requirement to label a fishery product to show that it is not the product of IUU or unsustainable fishing is designed to influence consumer choice, and is thereby potentially restrictive of trade.<sup>62</sup> There appear to be no requirements for mandatory labelling relating to IUU and unsustainable fishing that have been laid down at the multilateral level. The best-known proponent of unilateral mandatory labelling requirements is the USA, exemplified by the Dolphin Protection Consumer Information Act which lays down the conditions under which tuna products may be labelled as "dolphin-safe". Such a label signifies that the tuna has been caught by methods that minimised any by-catch of dolphins. Such by-catch has been

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<sup>54</sup> Young, note 15 at 140-1.

<sup>55</sup> For the operation of CITES in relation to marine fish species, see Calley, note 32, 161-205, Young, note 15, 134-88, especially 141-154, and S. Guggisberg *The Use of CITES for Commercially-Exploited Fish Species: A Solution to Illegal, Unreported and Unregulated Fishing?* (Heidelberg, Springer: 2016), especially 215-316.

<sup>56</sup> Resolution Conf. 14.6 (Rev. CoP16), note 52.

<sup>57</sup> Reg. No. 1005/2008, note 35, Arts. 12 and 13. For discussion of the scheme, see the literature listed in note 35. Hosch is particularly critical of the IUU Regulation: see Hosch, note 5 at 29-52.

<sup>58</sup> Ibid., Arts. 12(2) and 15.

<sup>59</sup> See note 43.

<sup>60</sup> Paras. 1.2 and 1.3.

<sup>61</sup> Paras. 3 and 4.

<sup>62</sup> The European Court of Justice, for example, has consistently held that a measure of an EU Member State designed to influence consumer choice in favour of products from that State is contrary to EU law on free movement of goods: see Case 249/81, *Commission v. Ireland* [1982] ECR 4005; and Case 102/86, *Apple and Pear Development Council v. Commissioners for Customs and Excise* [1988] ECR 1443.

considerable in certain tuna fisheries, particularly those in the Eastern Tropical Pacific.<sup>63</sup> This labelling measure is therefore designed to promote sustainable fishing in the broad sense.

#### 4. AN OVERVIEW OF RELEVANT INTERNATIONAL TRADE LAW

As mentioned earlier, the main aim of this Chapter is to assess the compatibility of the trade measures outlined in the previous section with international trade law. This section gives an overview of that law, while the following section assesses the compatibility of the various types of trade measures outlined in the preceding section with that law. When the question of such compatibility is raised, it is common to think primarily or even exclusively about compatibility with WTO law. However, goods are increasingly being traded, not under the most-favoured-nation regime of the WTO, but under preferential trade agreements (PTAs) (often called regional trade agreements, including by the WTO, even though their application is frequently not regional in any geographical sense),<sup>64</sup> albeit that many of the provisions of such PTAs are frequently similar to those of WTO law. As of January 2018 there were 284 PTAs in force.<sup>65</sup> It follows that in order to ascertain whether a particular trade measure is compatible with international trade law, it is necessary to consider not only WTO law but also any relevant PTA. Clearly, in a Chapter of this length it is impossible to consider the compatibility of the trade measures outlined in the previous section with PTAs, and so this section will be limited to considering only WTO law. Two of the WTO's so-called "covered agreements" are relevant in this context, the General Agreement on Tariffs and Trade (GATT)<sup>66</sup> and the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>67</sup> Each will be considered in turn.

##### 4.1 *General Agreement on Tariffs and Trade*

There are four provisions of the GATT with which the measures outlined in section 3 may be incompatible, namely Articles I.1, III, V and XI. However, even if a measure is incompatible with one or more of those provisions, it may not necessarily be unlawful as Article XX permits trade measures that would otherwise be inconsistent with the GATT if necessary to protect certain societal interests.

Article I.1 contains the most-favoured-nation principle, which prohibits a WTO member<sup>68</sup> from discriminating between other WTO members in relation to customs duties, other charges and all rules and formalities on imports or exports of "like products".<sup>69</sup> Article III sets out the principle of national treatment. This principle requires an importing State not to discriminate between "like" imported products and domestic products so as to afford protection

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<sup>63</sup> See further Chapter 7 in this Volume (Scott).

<sup>64</sup> PTAs may take one of two forms, a free trade agreement or a customs union: see Art. XXIV of the General Agreement on Tariffs and Trade (note 66 below).

<sup>65</sup> Information at <[https://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](https://www.wto.org/english/tratop_e/region_e/region_e.htm)>.

<sup>66</sup> General Agreement on Tariffs and Trade, 1994, 1867 UNTS 187. The 1994 GATT is the successor, and very similar, to the 1947 General Agreement on Tariffs and Trade, 55 UNTS 308.

<sup>67</sup> Agreement on Technical Barriers to Trade, 1994, 1868 UNTS 120.

<sup>68</sup> The term "WTO member" is used rather than "party to the GATT" as all WTO members are automatically parties to the GATT. The same applies to the TBT Agreement, discussed below.

<sup>69</sup> For a useful exposition by the Appellate Body as to its approach in determining whether a measure breaches Article I.1, see its ruling in *European Communities – Measures prohibiting the Importation and Marketing of Seal Products* (hereafter *Seal Products* case), Report of the Appellate Body, WT/DS400/AB/R (2014), paras. 5.86-5.93. All the reports of WTO Panels and the Appellate Body referred to in this Chapter can be found on the website of the WTO, <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/](http://www.wto.org/english/tratop_e/dispu_e/cases_e/)>.

to domestic production, either as regards internal taxation (Article III.2) or laws and regulations affecting the internal sale, transportation, distribution or use of goods (Article III.4).<sup>70</sup>

Article V provides for freedom of transit, stipulating that any WTO member may transport goods across the territory of another WTO member for export to any third member. In this regard it prohibits discrimination “based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.” Lastly, Article XI.1, headed “General Elimination of Quantitative Restrictions”, prohibits quantitative restrictions on imports and exports by providing that “[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by” any WTO member on the import or export of any product from or to any other WTO member. It therefore follows, as was confirmed by the report of the WTO Panel in *Colombia – Indicative Prices and Restrictions on Ports of Entry*,<sup>71</sup> that a WTO member that refuses access to a ship registered in another member to its ports for the purpose of unloading or loading goods for import or export to or from the first WTO member, or for transit to or from a third State, would be acting contrary to Articles XI and/or V, and therefore would violate the GATT unless its action could be justified under Article XX.

As mentioned earlier, Article XX permits measures that would otherwise be inconsistent with the provisions of the GATT just outlined in order to protect certain listed societal interests. Three of those interests are potentially relevant in the present context. First, paragraph (b) permits GATT-inconsistent measures if they are “necessary to protect human, animal or plant life or health.” The Appellate Body has held that if measures are to be justified under paragraph (b), they must be designed (i.e. have the policy objective) to protect human, animal or plant life or health.<sup>72</sup> Measures directed at unsustainable fishing fulfil that requirement as they are clearly designed to protect animal life. Insofar as alleged illegal or unregulated fishing leads to overfishing, as it frequently, but not automatically, does, measures to combat such fishing are also designed to protect animal life. Paragraph (b) stipulates that measures to protect animal life must be “necessary” if they are to be justified under Article XX. According to the Appellate Body, necessity relates to the necessity of the measure taken to achieve the policy objective, not the necessity of the policy objective itself. For a measure to be necessary, there must be no alternative measure reasonably available that would achieve the same objective but be less restrictive of trade.<sup>73</sup>

Second, paragraph (d) permits GATT-inconsistent measures if they are “necessary to ensure compliance with laws or regulations which are not inconsistent with the provisions [the GATT].” “Necessary” here has much the same meaning as in paragraph (b), in other words a measure is necessary if there is no alternative less trade-restrictive measure reasonably available.<sup>74</sup> In theory paragraph (d) is relevant to measures that target illegal fishing. However, in practice its relevance is rather limited as the Appellate Body has held that a WTO member may not use paragraph (d) to ensure compliance with another WTO member’s obligations under an international agreement (which would include RFMO measures and the Port State Measures Agreement), only compliance with its own national laws.<sup>75</sup>

The third societal interest relevant in the present context is set out in paragraph (g). This permits GATT-inconsistent measures “relating to the conservation of exhaustible natural

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<sup>70</sup> For a useful exposition by the Appellate Body as to its approach in determining whether a measure breaches Article III.4, see its ruling in the *Seal Products* case, paras. 5.99-5.117.

<sup>71</sup> *Colombia – Indicative Prices and Restrictions on Ports of Entry*, Report of the Panel, WT/DS366/R (2009).

<sup>72</sup> P. Van den Bossche and W. Zdouc *The Law and Policy of the World Trade Organization* (Cambridge University Press, Cambridge: 2013) 554.

<sup>73</sup> *Ibid.*, 556-560.

<sup>74</sup> *Korea – Various Measures on Beef*, Report of the Appellate Body, WS/DS161/AB/R (2001), paras. 157 and 166.

<sup>75</sup> *Mexico – Taxes on Soft Drinks*, Report of the Appellate Body, WS/DS308/AB/R (2006), paras. 69-78.

resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. The Appellate Body has held that “exhaustible natural resources” include renewable marine living resources.<sup>76</sup> To be justifiable under paragraph (g), a measure must “relat[e] to” the conservation of such resources. That means that there must be a reasonable relationship between the measure and the conservation objective, i.e. the measure must not be disproportionately wide in its scope or reach in relation to the policy objective pursued.<sup>77</sup> Measures to combat unsustainable fishing and unregulated fishing, as in the second sense used in section 2 above,<sup>78</sup> will clearly “relate” to the conservation of exhaustible natural resources. However, it may not be so straightforward to show that measures targeted at illegal fishing and unregulated fishing, as used in the first sense, relate to the conservation of exhaustible natural resources since illegal and such unregulated fishing do not necessarily lead to overfishing, as explained in section 2 above. In order for a measure to be justified under paragraph (g) of Article XX, it is also necessary that a measure is “made effective in conjunction with restrictions on domestic production or consumption.” That means that there must be some restrictions on domestic products, although not necessarily identical to those on imports. The Appellate Body has characterised that requirement as “even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”<sup>79</sup>

In order to be justified under Article XX, a measure must not only be for one of the societal interests listed in Article XX, it must also satisfy the requirements of that Article’s introductory provision, the so-called “*chapeau*”. The latter requires that the measure that a WTO member is seeking to justify under one of those interests must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” Discrimination will be arbitrary or unjustifiable where the reasons for the discrimination bear no rational connection to the policy objective under which the measure was provisionally justified under Article XX or would go against it.<sup>80</sup> A measure will constitute a disguised restriction on trade if the design, architecture or structure of the measure does not pursue the legitimate policy objective on which the measure was provisionally justified, but in fact pursues trade restrictive objectives.<sup>81</sup> The *Shrimp/Turtle* litigation suggests that the requirements of the *chapeau* of Article XX will be more easily satisfied if a measure implements an international agreement or there has been an attempt to engage in meaningful negotiations to conclude an international agreement to give effect to the desired policy objective.<sup>82</sup>

## 4.2 Agreement on Technical Barriers to Trade

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<sup>76</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereafter *Shrimp/Turtle* case), Report of the Appellate Body, WT/DS58/AB/R (1998), paras. 128-134.

<sup>77</sup> *Ibid.*, paras. 135-141.

<sup>78</sup> See text at note 19.

<sup>79</sup> *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R (1996), pp. 19-21.

<sup>80</sup> *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Recourse to Article 21.5 of the DSU by Mexico, Report of the Appellate Body, WT/DS381/AB/RX (2015), paras. 7.316, 7.329 and 7.343. Further on how to determine whether there is discrimination, see para. 7.301 and the *Seal Products* case, note 69, paras 5.299-5.302.

<sup>81</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW (2001), paras 5.138-5.144.

<sup>82</sup> *Ibid.*, and *Shrimp/Turtle* case, note 76 at paras. 166-72. See further the discussion of the case in section 5.1 below.

The Agreement on Technical Barriers to Trade (TBT Agreement) deals with restrictions on trade that may result from “technical regulations”. Only measures that are “technical regulations” fall within the scope of the Agreement. A technical regulation is defined in Annex I.1 of the Agreement as:

[A] document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking and labelling requirements as they apply to a product, process or production method.

In the *Seal Products* case the Appellate Body summed up and developed its existing jurisprudence on the meaning of this provision, stating that the scope of Annex I.1 “appears to be limited to those documents that establish or prescribe something and thus have a certain normative content.”<sup>83</sup> As for the term “product characteristics” that are the subject of such documents, these are “features and qualities intrinsic to the product itself” and include “objectively definable ‘features’, ‘qualities’, ‘attributes’ or other ‘distinguishing mark[s]’”, and may relate, for example, to a product’s “composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity or viscosity.”<sup>84</sup> The terms “related processes and production methods” have not yet featured in WTO litigation, but the Appellate Body considers that each individual term (process, production, method) has its ordinary dictionary meaning. The process or production method must be “related” to the characteristics of the product in question, which means that it must be “connected or ha[ve] a relation to the characteristics of the product”.<sup>85</sup> As for the second sentence of Annex I.1, the Appellate Body states that it “includes elements that are additional to, or may be distinct from, those covered by the first sentence.”<sup>86</sup> There is no clear-cut distinction between technical regulations dealt with by the TBT Agreement and measures that are the subject of the GATT. Thus, in the *US – Tuna II (Mexico)* case (see section 5.5 below) the Appellate Body assessed US labelling requirements for their compatibility with both the TBT Agreement and the GATT.

Article 2.1 of the TBT Agreement is similar to Articles I and III of the GATT. It requires WTO members to ensure that in respect of technical regulations, products imported from other WTO members are accorded “treatment no less favourable” than that accorded to “like” products of national origin and products originating in another country. In the *Tuna/Dolphin III* case the Appellate Body ruled that for a technical regulation to breach Article 2.1, it was not sufficient that the regulation modified conditions of competition in the market to the detriment of imported products; that detrimental impact must stem not from a legitimate regulatory distinction, but rather reflect discrimination against a group of imported products.<sup>87</sup> In short, there must be a lack of even-handedness in the treatment of imported products, amounting to arbitrary and unjustified discrimination.<sup>88</sup>

Article 2.2 of the TBT Agreement has parallels with Article XX of the GATT. It provides that technical regulations must not create “unnecessary obstacles to international trade. For this purpose, technical regulations must not be more trade-restrictive than necessary

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<sup>83</sup> *Seal Products* case, note 69 at para. 5.10. “Documents” cover “a broad range of instruments or apply to a variety of measures” (ibid.).

<sup>84</sup> Ibid., para. 5.11.

<sup>85</sup> Ibid., para. 5.12. See also paras. 5.67 and 5.69.

<sup>86</sup> Ibid., para. 5.14.

<sup>87</sup> *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (hereafter *US- Tuna II (Mexico)*), Report of the Appellate Body, WT/DS381/AB/R (2012), para. 215.

<sup>88</sup> Ibid., paras. 213 and 216.

to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Such legitimate objectives include, “*inter alia*”, protection of animal or plant life or health and the environment. The use of “*inter alia*” indicates that the list of objectives is not closed. According to the Appellate Body, the objectives listed provide a reference point from which other objectives may be considered legitimate. Objectives recognised in other WTO covered agreements “may provide guidance for, or may inform, analysis of what might be considered a legitimate objective under Article 2.2.”<sup>89</sup> As for the requirement in Article 2.2 that technical regulations must not create “unnecessary obstacles to international trade” or be “more trade-restrictive than necessary”, that provision is aimed at ensuring that restrictions on trade do not exceed what is necessary to achieve the legitimate objective concerned. In determining that question, it is necessary to consider what other less trade-restrictive measures may be reasonably available and the risks that would result from not fulfilling the objective concerned.<sup>90</sup>

Article 2.4 stipulates that where international standards exist, WTO members must use them “as a basis for their technical regulations except when such international standards . . . would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.” According to the Appellate Body, an international standard is one adopted by a body that has recognized activities in standardization and whose membership is open to all WTO members.<sup>91</sup> Article 2.5 provides that there is a rebuttable presumption that a technical regulation adopted for the one of the legitimate objectives mentioned in Article 2.2 and that is “in accordance with” relevant international standards does not create an unnecessary obstacle to international trade.

## **5. AN ASSESSMENT OF THE COMPATIBILITY OF TRADE MEASURES TO COMBAT ILLEGAL, UNREGULATED AND UNSUSTAINABLE FISHING WITH INTERNATIONAL TRADE LAW**

An assessment will now be made of the compatibility of each of the five types of trade measures reviewed in section 3 with the provisions of WTO law outlined in section 4. For reasons of space it will not be possible to try to determine definitively whether every particular measure referred to in section 3 is compatible. Rather what will be done will be to indicate the questions that will need to be considered for such a determination to be made. In doing so, reference will be made to those cases where trade measures identified in section 3 have been challenged for their compatibility with WTO law under the WTO’s DSU. An important, if rather obvious, preliminary point (but one overlooked by some writers) is that multilateral measures in the form of RFMO decisions and treaties cannot be challenged directly under the DSU as RFMOs and treaty COPs are not members of the WTO. Rather it is the implementation of an RFMO measure by an RFMO member or the implementation of a treaty by a State party to the treaty that can be challenged where that RFMO member or State party is a member of the WTO.

### **5.1 Bans on imports**

It is widely accepted that a ban on imports, whether in the form of a prohibition on the direct landing of catches in port or on the import of fishery products by other means, is a quantitative restriction and therefore contrary to Article XI of the GATT.<sup>92</sup> That proposition has, however,

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<sup>89</sup> Ibid., para. 313.

<sup>90</sup> Ibid., paras. 318-22.

<sup>91</sup> Ibid., para. 359.

<sup>92</sup> See, for example, the literature listed in note 95 below.

has been challenged by Serdy. He argues that because Article XI refers to “the importation of any product *of the territory* of any other contracting party” (emphasis added), it cannot apply to fish directly landed at a foreign port as the fish is not the product of any “territory” but of the sea.<sup>93</sup> It must be doubted whether this literal reading of Article XI is correct. Article XI was drafted in the late 1940s, when most fishing vessels landed their catches in their home port, so no trade occurred. In view of this, it may be doubted whether the drafters of the GATT gave much thought to fish trade in the form of direct landings. In the *Shrimp/Turtle* case the Appellate Body employed an intertemporal approach to interpretation, as well as making reference to other international instruments to interpret the GATT.<sup>94</sup>

Employing a similar approach, and noting that both the rules of origin and CITES treat the flag State as equivalent to the State of export, one could, and arguably should, interpret “territory” in Article XI to include vessels of the flag State in the case of marine fish caught outside the territorial sea. Article III.4 uses the same phrase as Article XI (apart from the plural), “products of the territory.” Thus, if Serdy was correct, direct landings of fish in a foreign port would fall outside the scope of two of the central provisions of the GATT. It must be doubted whether that was really the intention of the drafters of the GATT. Furthermore, a very literal construction could consider that fish products landed in one State and transported in an unprocessed form to another State were also not products of the territory of the first State, thus creating an even bigger loophole in the GATT.

If the would-be exporter intended that its fish should simply transit the territory of the State imposing the landing ban for onward transport to a third State, there would also be a breach of Article V on the right of transit. Furthermore, import bans that target individual named States, as a few RFMO measures have done, raise questions as to their compatibility with Article I.1 of the GATT as they appear to discriminate between imports from different States.

Import bans that are incompatible with Article I.1, V and XI.1 of the GATT may nevertheless be lawful if they can be justified under Article XX. It follows from the discussion of Article XX in section 4.1 above that an import ban to combat illegal, unregulated and unsustainable fishing may be justified under paragraph (b) if its purpose is to protect animal life and if it is “necessary”, i.e. there is no alternative measure reasonably available that is less restrictive of trade. Import bans for the purpose of combating unsustainable fishing will generally have no difficulty in fulfilling the first requirement. The position with bans aimed at illegal and unregulated fishing is not quite so straightforward, as explained below. Whether import bans fulfil the second requirement (the unavailability of less trade-restrictive measures) will depend on the circumstances of each case. Where an import ban is a sanction for non-compliance with a CDS or similar scheme, it would seem easier to show that this requirement is satisfied. An import ban may, additionally or alternatively, be justifiable under paragraph (g) as being a measure “relating to the conservation of exhaustible natural resources”. Since illegal or unregulated fishing does not necessarily lead to overfishing, an import ban aimed at combating such fishing may be easier to justify under paragraph (g) than paragraph (b), since it may be more straightforward to show that it “relat[es] to” fisheries conservation, rather than having to show that it is designed for conservation, as is necessary under paragraph (b). A State seeking to justify an import ban under paragraph (g) also has to show that the ban had been made effective in conjunction with restrictions on its domestic fishing industry. So, for example, in the case of a ban on imports from unregulated fishing, the importing State would have to show that its own vessels were prevented from fishing in the area concerned in a manner contrary to its international responsibilities.

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<sup>93</sup> Serdy, note 33 at 433.

<sup>94</sup> *Shrimp/Turtle* case, note 76 at paras 129-131.



If an import ban can be provisionally justified under paragraphs (b) and/or (g), it must still satisfy the requirements of the *chapeau* of Article XX in order to be lawful. It follows from the *Shrimp/Turtle* case that it is easier to show that an import ban does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade if it has been imposed pursuant to an international agreement. Thus import bans that are imposed to implement RFMO measures, the Port State Measures Agreement or CITES are likely to satisfy the *chapeau*.<sup>95</sup> An important question is whether that is also the case where action is taken against a WTO member that is not a member of the RFMO concerned or a party to the treaties mentioned. In the case of CITES there should be no problem, as virtually all members of the WTO are parties to CITES. While there is an argument that action cannot be taken against non RFMO members or non-parties to a treaty,<sup>96</sup> an alternative (and preferable) view is that given the general hostility of the international community to IUU fishing, as reflected in numerous international instruments, the treaties and RFMO measures mentioned should be seen as reflecting the interests of the international community and therefore on that basis should not be regarded as arbitrary or unjustifiable discrimination or a disguised restriction on trade. After all, the Appellate Body in the *Shrimp/Turtle* case did not suggest that it was a necessary condition that the defendant WTO member had to have concluded a treaty or entered into negotiations with the complainant WTO member in order for a measure not to be adjudged arbitrary or unjustifiable discrimination or a disguised restriction on trade. It may also be significant that the import bans imposed by RFMO members against non-members have so far never been challenged under the DSU as being contrary to the GATT.

It follows from discussion above that it will be more difficult for a WTO member to show that an import ban that it has imposed unilaterally, i.e. not in implementation of an international measure, satisfies the requirements of the *chapeau* of Article XX. The position is complicated by the fact that it is still unclear whether or how far a WTO member may seek to protect a societal value outside its own territorial jurisdiction and still be in conformity with Article XX.<sup>97</sup> That it is more difficult to justify unilateral measures is shown by the fact that such measures have to date been challenged in five cases, each of which will now be discussed briefly.

The first two cases were brought, not under the DSU, but under the pre-WTO dispute settlement procedures of the 1947 GATT. In *Tuna/Dolphin I* Mexico challenged a US ban on imports of tuna that had been imposed because Mexico did not have in place a regulatory regime for avoiding the incidental catch of dolphins in tuna fisheries that was comparable to the US regime. The US ban was thus a trade measure to combat unsustainable fishing in the broad sense. The Panel found that the import ban was a breach of Article XI of the GATT and could not be justified under either paragraphs (b) or (g) of Article XX because, in seeking to change the policies of other States towards the tuna/dolphin by-catch issue, the ban failed to satisfy the tests of necessity in paragraph (b) and relatedness in paragraph (g).<sup>98</sup> Three years later, in *Tuna/Dolphin II*, another Panel reached the same conclusion in relation to a US ban

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<sup>95</sup> This is a widely held view: see Calley, note 32 at 219; Roheim and Sutinen, note 4; R.G. Tarasofsky *Regional Fisheries Organizations and the World Trade Organization: Compatibility or Conflict?* (Cambridge, TRAFFIC International: 2003) 18-29; and Young, note 15 at 77 and literature cited there.

<sup>96</sup> This argument is made by Serdy, note 33 at 435.

<sup>97</sup> In the *Shrimp/Turtle* and *Seal Products* cases the Appellate Body explicitly left this point open: see note 76 at paras. 133 and note 69 at 5.173, respectively. See further B. Cooreman "Addressing Environmental Concerns through Trade: A Case for Extraterritoriality" (2016) 65 *International and Comparative Law Quarterly* 229.

<sup>98</sup> *United States – Restrictions on Imports of Tuna*, GATT document DS21/R (Mexico) (1991), reproduced in (1991) 30 *International Legal Materials* 1594. The Panel's report was not adopted by the parties to the GATT and therefore was not legally binding.

on imports of processed tuna where the raw material came from fisheries that failed to meet the US regulatory standard on dolphin by-catch.<sup>99</sup>

Some years later, after the establishment of the WTO, there was another, not dissimilar, case involving the US. Concerned by the high level of turtle by-catch in some shrimp fisheries, the US banned the import of shrimps that were caught with gear that had not been fitted with a turtle excluder device (TED). Thus, the ban was directed at unsustainable fishing in the broad sense. The ban was challenged by a number of Asian States in the *Shrimp/Turtle* case. The Appellate Body (reversing the Panel on many points) found that that the ban was a breach of Article XI of the GATT, but was provisionally justified under paragraph (g) of Article XX as turtles were an exhaustible natural resource, the ban was reasonably related to the legitimate policy objective of conserving turtles, and it had been made effective in conjunction with domestic producers, as US shrimp fishermen were also required to use TEDs. However, the US ban did not meet the requirements of the *chapeau* of Article XX because it constituted arbitrary and unjustifiable discrimination. Discrimination was arbitrary because there was a lack of due process in dealing with applications for import licences. The discrimination was also unjustifiable because the USA had applied the same standard to all shrimp fisheries without taking into account the different conditions prevailing in the complainant WTO members and because the USA had failed to engage in negotiations with the complainants to address a problem that could only be sufficiently addressed through multilateral cooperation.<sup>100</sup>

Following the Appellate Body's ruling, the US amended its legislation. Malaysia challenged that amendment under Article 21.5 of the DSU (dealing with compliance with rulings), arguing that the US had failed to implement the ruling correctly. However, the Appellate Body rejected that challenge. The US measure no longer amounted to arbitrary or unjustifiable discrimination as the same standard (the use of TEDs) was no longer applied: instead, exporting States were required to have a programme of comparable effectiveness. Furthermore, the USA had engaged in negotiations with Indian and Pacific Ocean States (including the original complainants) and had concluded a Memorandum of Understanding on turtle conservation; it was not necessary that a legally binding agreement should have been adopted.<sup>101</sup>

In the two other cases where a unilateral import ban was challenged under the DSU, the parties reached a settlement of the dispute before a WTO Panel was called on to give a ruling. The first case concerned a ban by Chile on the landing in its ports of swordfish caught by EU vessels on the high seas of the south-east Pacific. This could be characterised as a measure directed at alleged unregulated and/or unsustainable fishing. The EU commenced proceedings against Chile in 2000, arguing that the ban breached Articles V and XI of the GATT.<sup>102</sup> At the same time Chile instituted proceedings against the EU before the International Tribunal for the Law of the Sea, arguing that the EU was in breach of its obligations under the LOS Convention to cooperate over fisheries conservation. Both sets of proceedings were suspended in 2001, when the parties reached a provisional settlement, and terminated in 2009, when the parties reached a definitive settlement.<sup>103</sup>

In the second case the EU was the respondent rather than the complainant. In 2013 it imposed a ban on imports of herring and mackerel from the Faroe Islands under its Regulation

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<sup>99</sup> *United States – Restrictions on Imports of Tuna*, GATT document DS29/R (Netherlands and the European Community) (1994), reproduced in (1994) 33 *International Legal Materials* 839. The Panel's report was not legally binding for the same reason as in the previous case.

<sup>100</sup> *Shrimp/Turtle* case, note 76 at paras. 161-176.

<sup>101</sup> *Shrimp/Turtle* case *Recourse to Article 21.5*, note 81.

<sup>102</sup> *Chile – Measures affecting the Transit and Importation of Swordfish*, WT/DS193.

<sup>103</sup> See further R. Churchill "Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2009" (2010) 25 *International Journal of Marine and Coastal Law* 457-482 at 463-464.

on unsustainable fishing.<sup>104</sup> Denmark (on behalf of the Faroes) challenged the ban as a breach of Articles I, V and XI of the GATT. It also brought proceedings against the EU before an arbitral tribunal constituted under Annex VII of the LOS Convention, arguing that the EU had breached obligations of cooperation under the Convention. Both proceedings were terminated in 2014, when the parties reached a settlement of the dispute.<sup>105</sup>

## **5.2 Restrictions on transshipments**

It was concluded in section 3.3 above that restrictions on transshipment constitute, in trade law terms, a prohibition on imports and exports where transshipment takes place outside the territorial sea of any State and is between vessels of different nationalities, or where transshipment takes place in the territorial sea or port of a State other than the flag State of the fishing vessel. In those situations it follows from what was said in sections 4.1 and 5.1 above that the resulting restrictions on imports and exports are contrary to Article XI of the GATT and will only be lawful if they can be justified under Article XX of the GATT. What was said in section 5.1 about Article XX will apply equally here.

## **5.3 Landing requirements**

As observed in section 3.4 above, a coastal State that requires foreign vessels fishing in its EEZ to land their catches in its ports is effectively compelling such vessels to export to it, and thereby preventing them from re-exporting to other States. In other words, it is a restriction on exports. It will therefore be contrary to Article XI of the GATT. The question then is whether a landing requirement may nevertheless be permissible under Article XX of the GATT. If the purpose of the landing requirement is to ensure that foreign vessels fish lawfully in the coastal State's EEZ, the measure may be provisionally justified under paragraph (d) of Article XX as being "necessary to ensure compliance" with its laws or regulations, provided that there were no less trade-restrictive alternative measure available to ensure compliance with the coastal State's legislation, such as at sea enforcement or some form of collaborative enforcement between the coastal State and the flag State. Whether such an alternative was readily available and was as effective as a landing requirement would depend on the circumstances of each case. If the landing requirement could be provisionally justified under paragraph (d) of Article XX, it would then have to meet the requirements of the *chapeau*. Provided that a coastal State applied equally strict measures to ensure that its own vessels fishing in its EEZ complied with its legislation, there should be no question of arbitrary or unjustifiable discrimination. Nor would a landing requirement appear to be a disguised restriction on trade as the LOS Convention specifically authorises coastal States to prescribe landing requirements for foreign vessels.<sup>106</sup> The position would probably be different, however, if foreign vessels were prohibited from re-exporting their catches but the coastal State's vessels were allowed to export their catches, as that would constitute unjustified discrimination.

A landing requirement designed to ensure compliance with the coastal State's laws could possibly also be justified under paragraph (g) of Article XX as being reasonably related to the need to conserve fish. The compatibility with the GATT of a landing requirement for the purposes of conservation was considered by a Panel established under the Canada-US free trade agreement in a case that concerned a Canadian measure requiring vessels fishing in

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<sup>104</sup> See text at note 37.

<sup>105</sup> *European Union – Measures on Atlanto-Scandian Herring*, WT/DS469.

<sup>106</sup> See text at note 42 above.

Canadian waters to land their catches of herring and salmon in Canada.<sup>107</sup> Although established under the Canada-US free trade agreement, the Panel was required to consider the relevant provisions of the GATT. It found that Canada's measure was a restriction on exports and therefore contrary to Article XI.1 of the GATT. The measure could not be justified under paragraph (g) of Article XX of the GATT because a landing requirement that applied to 100 per cent of catches was not primarily aimed at conservation and therefore was not a measure "relating to the conservation of exhaustible natural resources" within the meaning of paragraph (g) of Article XX. However, the Panel suggested that a landing requirement would be justified under paragraph (g) "if provision were made to exempt from landing that proportion of the catch whose exportation without landing would not impede the data collection process" used for conservation and management purposes.<sup>108</sup> Since that decision was given (in 1989), the case law on Article XX has developed significantly and the LOS Convention, which authorises a landing requirement, has come into force. It may well be, therefore, that a less strict approach would be taken today.

#### **5.4 Catch documentation and similar schemes**

A CDS may fall within the scope of both the GATT and the TBT Agreement and be potentially incompatible with either or both. In practice no CDS has yet been challenged under the WTO's DSU for its compatibility with either agreement.

In the case of the TBT Agreement, the first question is whether a CDS is a "technical regulation" as defined in Annex I.1 of the Agreement and therefore falls within the scope of the Agreement. Applying the various elements in Article I.1 outlined in section 4.2, a CDS obviously requires the mandatory use of a "document". However, the documentation required in a CDS would not seem to lay down "product characteristics". Such documentation is concerned with where fish is caught and whether the vessel that caught it complied with RFMO or other applicable conservation and management measures. It is not concerned with the "characteristics" of the fish within the meaning of Annex I.1 – an illegally caught fish has exactly the same product characteristics as a legally caught fish. A CDS may be concerned with "production methods" if, for example, an RFMO prohibits the use of a particular type of fishing method (such as longlining) and the documentation is required to show the method of fishing employed. The question then is whether the production method specified is "related to", i.e. connected or having a relation to the product characteristics of the fish. It seems very unlikely that this will be the case, since fish will have the same characteristics howsoever caught. The second sentence of Annex I.1 is plainly not relevant in the present context. It thus seems very unlikely that a CDS is a technical regulation. This conclusion is supported by the *Seal Products* case where the Appellate Body found the measure at issue was not a technical regulation, primarily because it was concerned with the identity of the hunter and the type or purpose of the hunt from which the product was derived: those were not product characteristics.<sup>109</sup>

However, determining whether a measure is or is not a technical regulation within the meaning of Annex 1.1 of the TBT Agreement is clearly not an exact science. In the *Seal Products* case, for example, the Panel and the Appellate Body reached diametrically opposed conclusions as to whether the measure at issue in that case was a technical regulation. It would be wise, therefore, to consider the position in the (unlikely) situation that a CDS was considered

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<sup>107</sup> *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Report of the Panel, 16 October 1989, <[http://publications.gc.ca/collections/collection\\_2016/alena-sec-nafta/E100-2-1-89-1807-01-eng.pdf](http://publications.gc.ca/collections/collection_2016/alena-sec-nafta/E100-2-1-89-1807-01-eng.pdf)>.

<sup>108</sup> *Ibid.* at para. 7.40.

<sup>109</sup> *Seal Products* case, note 69 at paras. 5.41, 5.45 and 5.55. The Appellate Body decided that it did not have the information to consider whether the measure might relate to processes or production methods: see para. 5.69.

to be a technical regulation, and specifically its compatibility with Article 2 of the TBT Agreement. As long as a WTO member applies a CDS equally to all foreign vessels, and the CDS or a measure of equivalent effectiveness to catches landed by its own vessels, there should be no question of a breach of Article 2.1. That leads on to a consideration of Article 2.2, in particular the question of whether a CDS is more trade-restrictive than necessary to fulfil a legitimate objective. It may be argued that combating IUU fishing is a legitimate objective even though, as suggested earlier, it does not directly relate to the “protection of ... animal ... life or health” or protection of the environment, the only two potentially relevant objectives explicitly mentioned in Article 2.2. However, the list of “legitimate objectives” in Article 2.2 is not closed. Given the extensive opposition to IUU fishing expressed by the international community over many years in, for example, the IPOA-IUU, Port State Measures Agreement, the actions of RFMOs and numerous UN General Assembly Resolutions, it would seem reasonable to regard action to combat IUU fishing as a legitimate objective for the purposes of Article 2.2. The question then is whether a CDS is more trade-restrictive than necessary to fulfil that objective. Having to compile and show the necessary documentation would not seem to be excessively burdensome, and there does not appear to be any obvious alternative to a CDS that would be less trade-restrictive.

Article 2.4 of the TBT Agreement, it will be recalled, requires technical regulations to be based on international standards unless the latter are ineffective or inappropriate for the fulfilment of the legitimate objective pursued by the technical regulation in question. That raises the question of whether RFMO CDSs may be regarded as international standards. The answer would appear to be that they are not. RFMOs are not recognised as having standardizing functions, nor is their membership open to all WTO members. The position with the FAO is arguably different. It does have standardizing functions (for example, in relation to fish hygiene) and its membership is open to all WTO members (with the possible exceptions of Chinese Taipei, Hong Kong and Macau). Thus, the FAO Guidelines on Catch Documentation Schemes (discussed in section 3.4 above) would seem to be an international standard. As those Guidelines appear to be neither ineffective nor inappropriate, a CDS must be based on them. Those CDSs that are so based and whose objective is to combat IUU fishing will be presumed not to create an unnecessary obstacle to international trade and will therefore be lawful under the TBT Agreement.

Turning now to the compatibility of a CDS with the GATT, the two provisions of the latter with which there may be potential incompatibility are Articles I.1 and Article III.4. As regards Article I.1, a CDS comes within the “rules and formalities” of import and export referred to in that Article. It is thus necessary that a WTO member, when implementing an RFMO scheme or CITES, or applying its own unilateral scheme, does not discriminate between the imports of fish from other WTO members. As for Article III.4, a measure of a WTO member that implements an international CDS or applies its own scheme is a law, regulation or requirement affecting the internal sale of fish and thus comes within the scope of Article III.4. That means that the CDS must not lead to less favourable treatment for imported fish than fish caught by that State’s own vessels. As long as the latter are subject to the CDS or some other catch certification requirement that is equivalent in effect, there should be no question of a breach of Article III.4. It should therefore be a straightforward matter to ensure that a CDS is compatible with Articles I.1 and III.4 of the GATT.

Those CDSs that stipulate that non-compliance with their provisions requires imports of the products concerned to be prohibited, would seem to breach Article XI of the GATT. They may however, be saved by Article XX. What was said in section 5.1 about Article XX will apply equally here.

## ***5.5 Labelling requirements***

A measure requiring fishery products to be labelled in order to show whether or not they are the product of IUU or unsustainable fishing may fall within the scope of both the GATT and the TBT Agreement and be potentially incompatible with either or both. In the case of the TBT Agreement, the first question is whether a labelling scheme is a “technical regulation” as defined in Annex I.1 of the Agreement and therefore falls within the scope of the Agreement. It may be recalled from the discussion of the meaning of Annex I.1 in section 4.2 above that a technical regulation may include a measure requiring the use of certain labels, whether supplementary to or unconnected with measures relating to the characteristics, processes and production methods of a particular product. Thus, a mandatory labelling scheme is a technical regulation, as confirmed by WTO jurisprudence.<sup>110</sup> The question then is whether a labelling scheme is compatible with Article 2 of the TBT Agreement. As long as a WTO member applies a labelling scheme equally to all foreign vessels and to its own vessels, there should be no question of a breach of Article 2.1. As regards Article 2.2, the same points may be made as were made above in relation to CDS.

Article 2.4 of the TBT Agreement, it will be recalled, requires technical regulations to be based on international standards unless the latter are ineffective or inappropriate for the fulfilment of the legitimate objective pursued by the technical regulation in question. Bearing in mind what was said about the FAO as a standardizing body in section 5.4, the FAO’s Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries would appear to be effective and appropriate international standards.<sup>111</sup> A labelling scheme must therefore be based on those Guidelines. A scheme that is so based and which is designed to fulfil a legitimate objective will be presumed not to create an unnecessary obstacle to international trade and will therefore be lawful under Article 2.2.

Turning now to the compatibility of a labelling scheme with the GATT, the two provisions of the latter which may be potentially incompatible are Articles I.1 and Article III.4. As regards Article I.1, a labelling scheme comes within the “rules and formalities” of import and export referred to in that Article. It is thus necessary that a WTO member, when implementing a labelling scheme, does not discriminate between the imports of fish from other WTO members. Turning to Article III.4, a labelling scheme is a law, regulation or requirement affecting the internal sale of the fish concerned and thus falls within the scope of that article. That means that a labelling scheme must not lead to less favourable treatment for imported fish than fish caught by that State’s own vessels. As long as the latter are subject to the same labelling scheme, there should be no question of a breach of Article III.4. It should, therefore, be a relatively straightforward matter to design a labelling scheme that is compatible with Articles I.1 and III.4 of the GATT. Any scheme that is not so compatible would only be lawful if it could be saved by Article XX. What was said about Article XX in sections 4.1 and 5.1 above will apply equally here.

In practice there have been two challenges to labelling schemes, the first under the pre-WTO GATT dispute settlement machinery, the second under the WTO’s DSU. Both cases were brought by Mexico. Both concern US schemes relating to the labelling of tuna products as “dolphin-safe” and their application to the Eastern Tropical Pacific (ETP), where, as explained in section 3.5 above, there has traditionally been a high by-catch of dolphins in tuna fisheries. In *Tuna/Dolphin I* a GATT Panel found that the then US scheme, permitting tuna products to be labelled as “dolphin safe” if they did not contain tuna from fisheries with a significant dolphin by-catch but not prohibiting their sale if not so labelled, did not breach

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<sup>110</sup> See Van den Bossche and Zdouc, note 72 at 857-858.

<sup>111</sup> Available at <[www.fao.org/docrep/012/i1119t/i1119t.pdf](http://www.fao.org/docrep/012/i1119t/i1119t.pdf)>. The Guidelines were adopted in 2005 and amended in 2009.

Article I.1 of the GATT, as alleged by Mexico, because there was no discrimination in its application.<sup>112</sup>

The second case was *US – Tuna II (Mexico)*, brought more than 20 years later. The Appellate Body found that the labelling scheme in use by that time was a technical regulation within the meaning of the TBT Agreement and was in breach of Article 2.1 of the Agreement because it was not even-handed in the manner in which it addressed the risks to dolphins from tuna fishing. The scheme took a much stricter approach to the method of tuna fishing in the ETP than it did in relation to methods of tuna fishing in other parts of the world, which was not justified on the basis of the risks to dolphin mortality.<sup>113</sup> On the other hand, the Appellate Body found that there was no breach of Article 2.2 as the US scheme had a legitimate objective (the protection of animal life – that of dolphins) and there were no alternative means available for achieving that objective that were less trade-restrictive. The Appellate Body also found that there was no breach of Article 2.4 of the TBT Agreement because there was no “relevant international standard” in existence. The dolphin-safe definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program (1998) was no such standard, as the Agreement was not a standardizing body and was not open to participation by all WTO members.<sup>114</sup> The Appellate Body did not refer to the FAO’s Guidelines on Ecolabelling.

Following the Appellate Body’s ruling, the US amended its legislation. Mexico brought further proceedings under Article 21.5 of the DSU, arguing that the amendments did not comply with the Appellate Body’s ruling and that the US labelling scheme was still contrary to the TBT Agreement and the GATT. The Appellate Body, overruling the Panel on most points, found that the US scheme continued to violate Article 2.1 of the TBT Agreement because there were stricter observer certification requirements in the ETP tuna fishery than in tuna fisheries in other parts of the world that presented a comparably high risk of dolphin mortality.<sup>115</sup> The Appellate Body also dealt with the GATT, which had not been considered in the original proceedings for reasons of judicial economy. It held that there were breaches of Articles I.1 and III.4 of the GATT for broadly the same reasons that there was a breach of Article 2.1 of the TBT Agreement.<sup>116</sup> Those breaches were not saved by Article XX of the GATT because the US scheme did not fulfil the requirements of the *chapeau* of Article XX, as the differences in the observer certification requirements between the ETP tuna fishery and tuna fisheries elsewhere amounted to arbitrary and unjustifiable discrimination.

In the light of the Appellate Body’s ruling (which was given in 2015), Mexico sought permission to take retaliatory action against the US under Article 22 of the DSU. That was challenged by the US and referred to arbitration. Following the arbitral tribunal’s ruling,<sup>117</sup> the WTO’s Dispute Settlement Body in 2017 authorized Mexico to suspend the application of certain tariff concessions and related obligations to the US in the amount of US \$163 million

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<sup>112</sup> See note 98 above.

<sup>113</sup> *United States – Tuna II (Mexico)*, note 87. For comment on the case, see M. Crowley and R. Howse “Tuna-Dolphin II: A Legal and Economic Analysis of the Appellate Body’s Report” (2014) 13 *World Trade Review* 321-55.

<sup>114</sup> The text of the Agreement, as amended in 2014, is available at <[www.iattc.org/PDFFiles2/AIDCP-amended-Jul-2014.pdf](http://www.iattc.org/PDFFiles2/AIDCP-amended-Jul-2014.pdf)>.

<sup>115</sup> *US – Tuna II (Mexico)* (Art. 21.5 proceedings), note 80. For comment on the decision, see C. Coglianese and A. Sapir “Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin-Safe Tuna Labeling Regime” (2017) 16 *World Trade Review* 327-48.

<sup>116</sup> But the test for discrimination is not identical as between Article 2 of the TBT Agreement and Articles I.1 and III.4 of the GATT: see *ibid* at paras. 7.277-7.278. See also *US – Tuna II (Mexico)* note 87 at para. 215 and the *Seal Products* case, note 69 at paras. 5.122-5.129. On the relationship between discrimination in Article 2 of the TBT Agreement and Article XX of the GATT, see *US – Tuna II (Mexico)* (Art. 21.5 proceedings), note 80 at para. 7.345.

<sup>117</sup> *US – Tuna II (Mexico)*, Recourse to Article 22.6, Decision of the Arbitrator, WT/DS381/ARB (2017).

per annum.<sup>118</sup> While the arbitration proceedings were ongoing, the US made yet further amendments to its tuna labelling scheme in order to try to bring it into compliance with the Appellate Body's ruling. Those amendments were again challenged by Mexico for non-compliance with the Appellate Body's ruling. However, the Panel rejected that challenge.<sup>119</sup> Mexico has appealed the Panel's finding. As of March 2018 the Appellate Body had not given its ruling.

Mexico brought its original complaint that the US labelling scheme violated the TBT Agreement and the GATT in 2008. A decade later, that dispute had still not been resolved. The case offers a cautionary tale to any other WTO member contemplating the unilateral introduction of a labelling scheme. At least the various rulings have clarified what a WTO member needs to do to try to ensure that any labelling scheme aimed at discouraging illegal, unregulated or unsustainable fishing is compliant with WTO law. What is also clear is that WTO law does not prevent WTO members from introducing such schemes; what it does require, above all, is that there is no discrimination, in the sense of differences of treatment that cannot be justified on the basis of factual differences, in the operation of such schemes.

## 6. CONCLUSIONS

States and international organizations have used a variety of trade measures to combat illegal, unregulated and unsustainable fishing. They include import bans, restrictions on transshipment, landing requirements, catch documentation and similar schemes, and labelling schemes. All these types of measures raise questions about their compatibility with WTO law. Import bans and restrictions on transshipment breach Article XI of the GATT, but may nevertheless be lawful if they can be justified under Article XX of the GATT. It will usually be fairly straightforward to show that they have been imposed to protect one of the societal interests listed in Article XX (protection of animal life and health and/or conservation of exhaustible natural resources), but less easy to show that they meet the requirements of the *chapeau* of Article XX of not amounting to arbitrary or unjustifiable discrimination or a disguised restriction on trade. Practice shows that bans that implement international instruments are far less likely to be challenged in judicial proceedings under the WTO's dispute settlement procedures than purely unilateral measures.

A requirement by a coastal State that a foreign vessel fishing in its EEZ land the catch in one of its ports in order to enable it to determine whether the vessel has been fishing lawfully will also be contrary to Article XI of the GATT as a restriction upon the vessel's ability to export. However, it is likely to be saved by Article XX as the latter allows WTO members to adopt otherwise inconsistent WTO measures in order to secure compliance with their national laws and because the LOS Convention authorizes coastal States to impose landing requirements on foreign vessels fishing in their EEZs, which means that there should be no question of the requirements of the *chapeau* of Article XX not being fulfilled.

Catch documentation schemes may possibly be technical regulations within the meaning of the Agreement on Technical Barriers to Trade and therefore fall within its purview, but that is unlikely. As long as they are not discriminatory, such schemes should not breach the GATT, specifically Articles I.1 and III.4. Unlike catch documentation schemes, a measure requiring the labelling of fishery products to show that it is not the product of IUU or unsustainable fishing will be a technical regulation within the meaning of the TBT agreement. That means that it must be applied without discrimination and should probably be based on the

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<sup>118</sup> See <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm)>.

<sup>119</sup> *US – Tuna II (Mexico)*, Second Recourse to Article 21.5, Panel Report, WT/DS381/RW2 (2017).



FAO Guidelines on the Ecolabelling of Fishery Products. The GATT also requires that a labelling scheme is not discriminatory. The decade-long saga before the WTO dispute settlement bodies concerning the legality of the “dolphin-safe” labelling of tuna products required by the US shows vividly how a labelling scheme may be discriminatory.